

***United States Court of Appeals  
for the Second Circuit***



**APPENDIX**





# 74-1149

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## United States Court of Appeals

SECOND CIRCUIT

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Docket 74-1149

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A/S CUSTODIA,  
*Petitioner-Appellant,*

—against—

LESSIN INTERNATIONAL, INC.,  
*Respondent-Appellee.*

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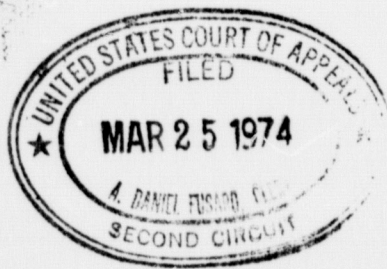
### JOINT APPENDIX

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New York, New York 10004

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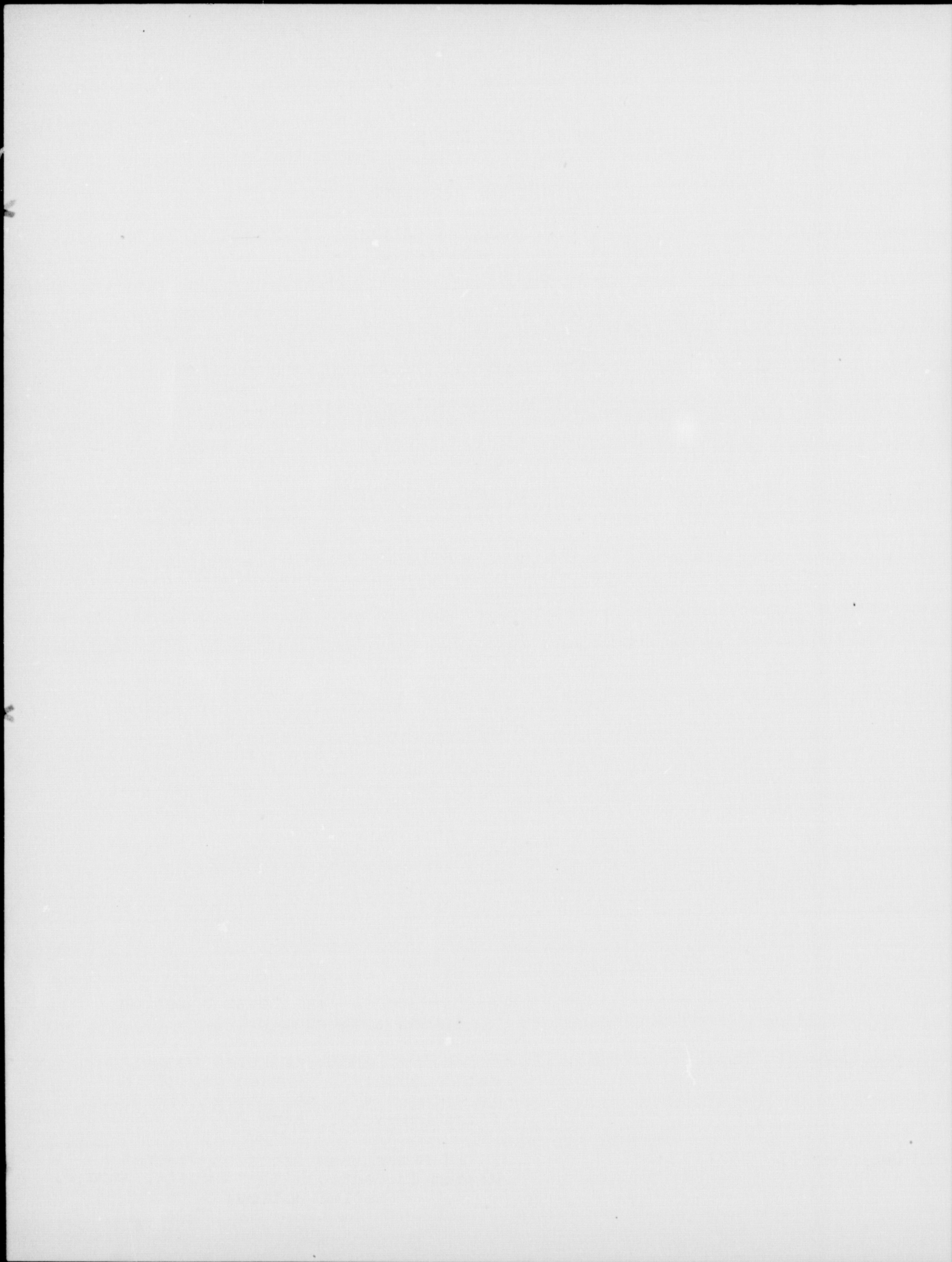
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## TABLE OF CONTENTS

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	<u>PAGE</u>
Relevant Docket Entries . . . . .	1a
Petition to Compel Arbitration . . . . .	3a
Notice of Motion to Compel Arbitration . . . . .	15a
Memorandum of Law in Support of Petitioner's Motion to Compel Arbitration . . . . .	17a
Affidavit of Dr. Leon Sinder in Opposition to Petition to Compel Arbitration . . . . .	22a
Memorandum of Law in Opposition to Petition to Compel Arbitration . . . . .	24a
Petitioner's Reply Affidavit in Support of Motion to Compel Arbitration . . . . .	28a
Reply Memorandum in Support of Petitioner's Motion to Compel Arbitration . . . . .	43a
Reply Memorandum of Law in Opposition to Petitioner's Motion to Compel Arbitration . . . . .	47a
Memorandum Decision of Honorable Robert J. Ward dated November 15, 1973 . . . . .	51a
Notice of Motion for Reargument . . . . .	52a
Memorandum of Law in Support of Petitioner's Motion for Reargument . . . . .	53a
Memorandum of Law in Opposition to Motion for Reargument . . . . .	56a
Memorandum Decision of Honorable Robert J. Ward dated December 21, 1973 . . . . .	60a
Judgment dated January 3, 1974 . . . . .	62a





RELEVANT DOCKET ENTRIES

Date Filed

October 5, 1973	Filed Petition to Compel Arbitration
October 11, 1973	Filed Petitioner's notice of motion to compel arbitration Ret. 10-23-73
October 11, 1973	Filed Petitioner's Memorandum of Law in support of motion to compel arbitration
October 19, 1973	Filed affidavit of Dr. Leon Sinder in opposition to petition to compel
October 19, 1973	Filed respondent's memorandum in opposition to petition to compel
October 31, 1973	Filed Reply affidavit by John J. Reilly, for petitioner
October 31, 1973	Filed Reply memorandum of law in support of petitioner's motion to compel arbitration
November 15, 1973	Filed Memo, on motion to compel arbitration dated 10/11/73. Motion denied and petition is dismissed, with costs. Ward J. (mailed notice)
November 26, 1973	Filed Memorandum of Law in support of petitioners motion for reargument
November 26, 1973	Filed Petitioner Notice of Motion. Re; Reargument. ret. 12/4/73.
December 3, 1973	Filed Respondents memorandum of law in Opposition to Petitioners motion for reargument
December 21, 1973	Filed Reply memorandum of law in opposition to petitioner's motion to compel arbitration
December 21, 1973	Filed Memorandum endorsed on motion dated 11/26/73. Motion denied in accordance with memorandum decision filed herewith. Ward J.
December 21, 1973	Filed Memorandum decision Ordered Motion is denied without costs. Ward J. (mailed notice)

January 4, 1974

Filed Bill of Costs in the amount of \$20.00 against petitioner. Clerk No appearance in opposition Clerk.

January 3, 1974

Filed judgment, Ordered that the petition is dismissed with costs to respondent. Clerk.

January 21, 1974

Filed Petitioners Notice of Appeal from Order entered 11/15/73. (mailed notice)



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X

In the Matter of the Arbitration :

Between	:	PETITION TO COMPEL
A/S CUSTODIA,	:	<u>ARBITRATION</u>
Petitioner,	:	
-and-	:	
LESSIN INTERNATIONAL, INC.	:	
Respondent.	:	

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Petitioner, A/S CUSTODIA, by its attorneys, Haight, Gardner, Poor & Havens, for its Petition herein, alleges upon information and belief as follows:

1. Petitioner, A/S CUSTODIA, was at all times mentioned herein and still is a corporation duly organized and existing under and by virtue of the laws of the Kingdom of Norway and the Owner of the M/V "FERNGROVE".

2. Respondent, LESSIN INTERNATIONAL, INC., was at all times mentioned herein and still is a corporation duly organized and existing under and by virtue of the laws of one of the States of the United States with an office at 80 W. 40th Street, New York, New York 14202.



3. On or about June 21, 1973 petitioner and respondent entered into a contract of Charter Party whereby the petitioner agreed to transport at an agreed freight rate and the respondent agreed to supply an agreed quantity of cargo for transport. The terms of said contract of Charter Party, a copy of which is annexed hereto as Exhibit "A", is incorporated herein as if herein set forth at length.

4. Petitioner and the M/V "FERNGROVE" duly performed all of their obligations to respondent in accordance with the terms of said contract of Charter Party.

5. The contract of Charter Party provides for arbitration of disputes in New York as follows:

"33. Any and all differences and disputes of whatsoever nature arising out of this Charter, shall be put to arbitration in the City of New York pursuant to the Laws relating to arbitration there in force, before a board of three persons consisting of one arbitrator to be appointed by the Owners, one by the Charterers, and one by the two so chosen. The decision of any two of the three on any point or points shall be final."

6. Disputes have arisen between petitioner and respondent in regard to claims arising under the aforesaid contract of Charter Party and said petitioner is now seeking the amount of approximately \$76,000 from respondent.

7. That on September 11, 1973, petitioner named an arbitrator, Mr. William Lynn, a commercial man whose address is c/o American Union Transportation, 15 E. 26th Street, New York, New York 10010, and demanded that respondent name an arbitrator and that said disputes be submitted to arbitration in accordance with the above-quoted arbitration agreement. To date, respondent has failed to com-

5a

ply with petitioner's request that it name an arbitrator and proceed to arbitration as aforesaid.

8. Except for the above-quoted arbitration provision of the contract of Charter Party, this Court would have jurisdiction of the disputes which are the subject matter herein, thus satisfying the provisions of Title 9 U.S.C. Section 4.

WHEREFORE, petitioner prays that the Court enter an Order herein directing that respondent appoint an arbitrator ~~in accordance with the above-quoted arbitration provision of the contract of Charter Party~~ within a period of time to be fixed by the Court, and further providing that, in the event respondent should fail to appoint an arbitrator on its behalf, and for such other, further and different relief as may be just in this matter.

Dated: New York, New York  
*October 5*, 1973

HAIGHT, GARDNER, POOR & HAVENS  
Attorneys for Petitioner  
One State Street Plaza  
New York, New York 10004

By

\_\_\_\_\_  
JOHN J. REILLY



STATE OF NEW YORK     )  
                                   ss.:  
 COUNTY OF NEW YORK    )

JOHN J. REILLY, being duly sworn, deposes and says:

I am an attorney and an associate of the firm of Haight, Gardner, Poor & Havens, attorneys for the petitioner herein. I have read the foregoing Petition and know the contents thereof, and the same is true to the best of my knowledge, information and belief. The sources of my knowledge or information are communications received from the petitioner and its agents and an examination of the papers relating to the matter in suit.

The reason why this verification is not made by the petitioner is that said petitioner is a foreign corporation, none of whose officers is within this District or within the City of New York

\_\_\_\_\_  
 John J. Reilly

Sworn to before me this

day of                   , 1973

\_\_\_\_\_  
 Notary Public

RUBY M. FITZHUGH  
 NOTARY PUBLIC, State of New York  
 No. 24-63: r.35  
 Qualified in Kings County  
 Certificate filed in New York County  
 Commission Expires March 30, 1974

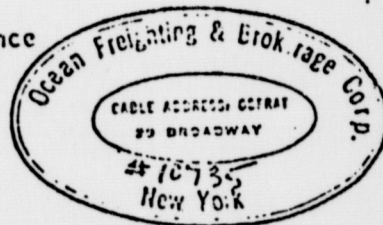
Issued to come into force for fixtures on and after 15th September 1922

The Documentary Council of The Baltic and White Sea Conference

# UNIFORM GENERAL CHARTER

AS REVISED 1922

(only to be used for trades for which no approval form is in force)



NEW YORK, N.Y. June 21, 1973

Owners.

1. It is this Day mutually agreed between A/S CUSTODIA  
(FEARNLEY & EGER, OSLO)

Norwegian

Owners of the motor-vessel

FERNGROVE, Geared Bulker built 1965

of 7744 tons Register and carrying about tons of deadweight cargo,

Position.

now trading, Classed 100 A-1 Lloyd's or Equivalent

and expected ready to load under this Charter about July 2, 1973

Charterers.

and Messrs. LESSIN INTERNATIONAL INC.

of New York, N.Y. as Charterers.

Where to load.

That the said vessel shall proceed to One (1) safe berth, Tampa,  
Florida or so near thereto as she may safely get and lie

Cargo.

always afloat, and there load a full and complete cargo <sup>Underdeck</sup> ~~of shipment of deck cargo~~  
~~agreed to be at Charterers' risk~~ of

HEAVY HANDY DEADWEIGHT SCRAP (excluding MOTOR BLOCKS  
AND TURNINGS) Stowing maximum 55 cubic feet to the ton  
of 2240 Lbs.

(Charterers to provide all mats and/or wood for dunnage and any separations required,  
the Owners allowing the use of any dunnage wood on board if required) which the  
Charterers bind themselves to ship, and being so loaded the vessel shall proceed to

One safe berth, one safe port, Taiwan

~~as ordered on signing Bills of Lading~~ or so near thereto as she may safely get and  
lie always afloat and there deliver the cargo ~~on being paid freight~~ <sup>freight</sup> quantity as

follows. LUMP SUM OF \$467,400.00 (FOUR HUNDRED SIXTY-SEVEN  
THOUSAND FOUR HUNDRED DOLLARS) U.S. CURRENCY. If vessel  
loads more than 15,580 Long Tons, Additional Freight to be  
paid at \$30.00 per Ton. Ninety Percent (90%) of Freight  
to be prepaid within seven (7) days after surrender of  
signed Bills of Lading, marked "Freight Prepaid as Per

lost or not lost. Balance payable  
on completion of discharge. Charterers  
privilege to deduct undisputed despatch  
and brokerage from freight. Freight to  
be made payable to J.H. Winchester & Co., 19 Rector St.  
N.Y., N.Y. for  
transfer to Owners.



General Average  
Clause.

2. Owners are to be responsible for loss of or damage to the goods or for delay in delivery of the goods only in case the loss, damage or delay has been caused by the improper or negligent stowage of the goods (unless stowage performed by shippers or their stevedores or servants) or by personal want of due diligence on the part of the Owners or their Manager to make the vessel in all respects seaworthy and to secure that she is properly manned, equipped and supplied or by the personal act or default of the Owners or their Manager.

And the Owners are responsible for no loss or damage or delay arising from any other cause whatsoever, even from the neglect or default of the Captain or crew or some other person employed by the Owners on board or ashore for whose acts they would, but for this clause, be responsible, or from unseaworthiness of the vessel on loading or commencement of the voyage or at any time whatsoever.

Damage caused by contact with or leakage, smell or evaporation from other goods or by the inflammable or explosive nature or insufficient package of other goods not to be considered as caused by improper or negligent stowage, even if in fact so caused.

Deviation Clause.

3. The vessel has liberty to call at any port or ports in any order, for any purpose, to sail without pilots, to tow and/or assist vessels in all situations, and also to deviate for the purpose of saving life and/or property.

Payment of Freight.

4. ~~The freight to be paid in cash without discount on delivery of the cargo at mean rate of exchange ruling on day of payment, the receivers of the cargo being bound to pay freight on account during delivery, if required by Captain or Owners.~~

~~Cash for vessel's ordinary disbursements at port of loading to be advanced by Charterers if required at highest current rate of exchange, subject to two per cent. to cover insurance and other expenses.~~

Loading.

5. ~~Cargo to be brought alongside in such a manner as to enable vessel to take the goods with her own tackle and to load the full cargo in running working days. Charterers to procure and pay the necessary men on shore or onboard the lighters to do the work there, vessel only heaving the cargo onboard.~~

~~If the loading takes place by elevator cargo to be put free in vessel's holds, Owners only paying trimming expenses.~~

~~Any pieces and/or packages of cargo over two tons weight, shall be loaded, stowed and discharged by Charterers at their risk and expense.~~

Time to commence at 1 p.m. if notice of readiness to load is given before noon and at 8 a.m. next working day if notice given during office hours after noon.

The notice to be given to the Shippers, Messrs.....

Time lost in waiting for berth to count as loading time.

Discharging.

6. ~~Cargo to be received by Merchants at their risk and expense alongside the vessel not beyond the reach of her tackle and to be discharged in running working days. Time to commence at 1 p.m. if notice of readiness to discharge is given before noon, and at 3 a.m. next working day if notice given during office hours after noon.~~

~~Time lost in waiting for berth to count as discharging time if incurred, to be paid by Charterers~~

Demurrage.

7. ~~Ten running days on Demurrage at the rate of Six Thousand Two Hundred per day or pro rata for any part of a day, payable day by day, to be allowed Merchants altogether at ports of loading and discharging.~~

Lien Clause.

8. Owners shall have a lien on the cargo for freight, dead-freight, demurrage and damages for detention. Charterers shall remain responsible for dead-freight and demurrage (including damages for detention), incurred at port of loading. Charterers shall also remain responsible for freight and demurrage (including damages for detention) incurred at port of discharge, but only to such extent as the Owners have been unable to obtain payment thereof by exercising the lien on the cargo.

Bills of Lading.

9. The Captain to sign Bills of Lading at such rate of freight as presented without prejudice to this Charterparty, but should the freight by Bills of Lading amount to less than the total chartered freight the difference to be paid to the Captain in cash on signing Bills of Lading.

Strike, War and  
Ice-Clause.

10. *Strike-Clause, War Clause and Ice-Clause as below.*

Dollars  
(\$6200.00)

If has already commenced, at the nearest safe place at the expense of the Cargo Owners. Owners to have the right to fill up with other goods instead of the contraband. 142

Should any port where the vessel has to load under this Charter be blockaded the contract to be null and void with regard to the goods to be shipped at such port. 143

No Bills of Lading to be signed for any blockaded port, and if the port of destination be declared blockaded after Bills of Lading have been signed, Owners shall discharge the cargo either at the port of loading, against payment of the expenses of discharge, if the ship has not sailed thence, or, if sailed at any safe port on the way as ordered by Shippers or if no order is given at the nearest safe place against payment of full freight. 144  
145  
146  
147  
148  
149  
150

## GENERAL ICE CLAUSE. 151

### PORT OF LOADING. 152

- a) In the event of the loading port being inaccessible by reason of ice when vessel is ready to proceed from her last port or at any time during the voyage or on vessel's arrival or in case of frost sets in after vessel's arrival, the Captain for fear of being frozen in is at liberty to leave without cargo, and this Charter shall be null and void. 153
- b) If during loading the Captain, for fear of vessel being frozen in, deems it advisable to leave, he has liberty to do so with what cargo he has on board and to proceed to any other port or ports with option of completing cargo for Owner's benefit for any port or ports including port of discharge. Any part cargo thus loaded under this Charter to be forwarded to destination at vessel's expense but against payment of freight, provided that no extra expenses be thereby caused to the Receivers, freight being paid on quantity delivered (in proportion if lumpsum), all other conditions as per Charter. 154  
155  
156  
157  
158  
159  
160  
161  
162  
163
- c) In case of more than one loading port, and if one or more of the ports are closed by ice, the Captain or Owners to be at liberty either to load the part cargo at the open port and fill up elsewhere for their own account as under section B or to declare the charter null and void unless Charterers agree to load full cargo at the open port. 164  
165  
166  
167
- d) This Ice Clause not to apply in the Spring. 168

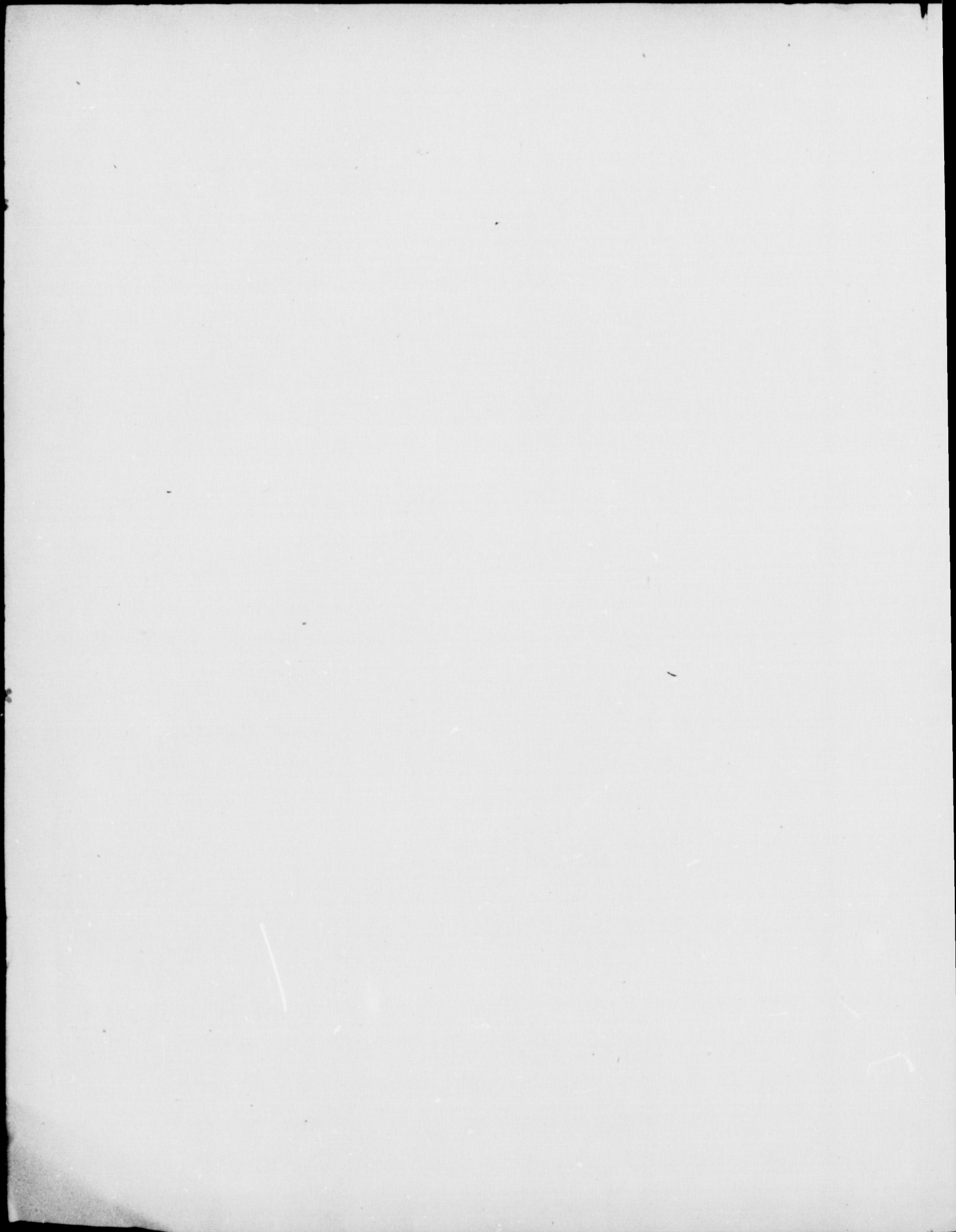
### PORT OF DISCHARGE. 169

- a) Should ice (except in the Spring) prevent vessel from reaching port of discharge Receivers shall have the option of keeping vessel waiting until the re-opening of navigation and paying demurrage, or of ordering the vessel to a safe and immediately accessible port where she can safely discharge without risk of detention by ice. Such orders to be given within 48 hours after Captain or Owners have given notice to Charterers of the impossibility of reaching port of destination. 170  
171  
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- b) If during discharging the Captain for fear of vessel being frozen in deems it advisable to leave, he has liberty to do so with what cargo he has on board and to proceed to the nearest accessible port where she can safely discharge. 176  
177  
178
- c) On delivery of the cargo at such port, all conditions of the Bill of Lading shall apply and vessel shall receive the same freight as if she had discharged at the original port of destination, except that if the distance of the substituted port exceeds 100 nautical miles, the freight on the cargo delivered at the substituted port to be increased in proportion. 179  
180  
181  
182

Clauses Nos. 16 through 43, both inclusive, as attached hereto, are to be considered fully incorporated in this Charter Party.

LESSIN INTERNATIONAL INC.





LAYDAYS, if required by the Charterers, not to commence before June 29, 19

informed by Owners or Master  
of such delay.

Cancelling Clause.

11. Should the vessel not be ready to load (whether in berth or not) on or before the July 10, 1972 Charterers have the option of cancelling this contract, such option to be declared, if demanded, at least 48 hours before vessel's expected arrival at port of loading. Should the vessel be delayed on account of average or otherwise, Charterers to be informed as soon as possible, and if the vessel is delayed for more than 10 days after the day she is stated to be expected ready to load, Charterers have the option of cancelling this contract unless a cancelling date has been agreed upon.

General Average.

12. General average to be settled according to York—Antwerp rules, 1950. Priorities of cargo to pay the cargo's share in the general expenses even if same have been necessitated through neglect or default of the Owners' servants (see clause 2).

Indemnity.

13. Indemnity for non-performance of this Charter-party, proved damages, not exceeding estimated amount of Freight.

Agency.

14. In every case the Owner shall appoint his own Broker or Agent both at the port of loading and the port of discharge.

Brokerage.

15. 2½ % brokerage on the freight/earned is due to OCEAN FREIGHTING & BROKERAGE CORP. AND OTHERS

In case of non execution at least 1/3 of the brokerage on the estimated amount of freight and dead-freight to be paid by the Owners to the Brokers as indemnity for the latter's expenses and work. In case of more voyages the amount of indemnity to be mutually agreed.

#### GENERAL STRIKE CLAUSE.

Neither Charterers nor Owners shall be responsible for the consequences of any strikes or lock-outs preventing or delaying the fulfilment of any obligations under this contract.

If there is a strike or lock-out affecting the loading of the cargo, or any part of it, when vessel is ready to proceed from her last port or at any time during the voyage to the port or ports of loading or after her arrival there, Captain or Owners may ask Charterers to declare, that they agree to reckon the laydays as if there were no strike or lock-out. Unless Charterers have given such declaration in writing (by telegram, if necessary) within 24 hours, Owners shall have the option of cancelling this contract. If part cargo has already been loaded, Owners must proceed with same, (freight payable on loaded quantity only) having liberty to complete with other cargo on the way for their own account.

If there is a strike or lock-out affecting the discharge of the cargo on or after vessel's arrival at or off port of discharge and same has not been settled within 48 hours, Receivers shall have the option of keeping vessel waiting until such strike or lock-out is at an end against paying half demurrage after expiration of the time provided for discharging, or of ordering the vessel to a safe port where she can safely discharge without risk of being detained by strike or lock-out. Such orders to be given within 48 hours after Captain or Owners have given notice to Charterers of the strike or lock-out affecting the discharge. On delivery of the cargo at such port, all conditions of this charterparty and of the Bill of Lading shall apply and vessel shall receive the same freight as if she had discharged at the original port of destination, except that if the distance of the substituted port exceeds 100 nautical miles, the freight on the cargo delivered at the substituted port to be increased in proportion.

#### GENERAL WAR CLAUSE.

If the nation under whose flag the vessel sails should be engaged in war and the safe navigation of the vessel should thereby be endangered either party to have the option of cancelling this contract, and if so cancelled, cargo already shipped shall be discharged either at the port of loading or, if the vessel has commenced the voyage, at the nearest safe place at the risk and expense of the Charterers or Cargo-Owners.

If owing to outbreak of hostilities the goods loaded or to be loaded under this contract or part of them become contraband of war whether absolute or conditional or liable to confiscation or detention according to international law or the proclamation of any of the belligerent powers each party to have the option of cancelling this contract as far as such goods are concerned, and contraband goods already loaded to be then discharged either at the port of loading, or if the voyage



M/S FERN GROVE  
C/P dated June 21, 1973

6. Cargo is to be loaded, stowed and discharged by the Charterers, free of expense to the vessel.
  7. Cargo is to be loaded, stowed and discharged within a total of eighteen (18) weather working days of 24 hours, Sundays and Holidays excepted, unless used.  
If longer detained, Charterers to pay demurrage at the rate stipulated in Clause 7;  
If sooner despatched, Owners to pay despatch at the rate of THREE THOUSAND ONE HUNDRED DOLLARS (\$3100.00) per day or pro rata for part of a day on laytime saved.  
Demurrage and despatch to be settled within sixty (60) days after completion of discharge.
  8. Time from Noon Saturday until 8:00 a.m. Monday not to count, unless used  
Time from Midnight preceding Holiday until 8:00 a.m. the day after Holiday not to count, unless used.
  9. Owners to give five (5) days notice, also 72/48/24 hours notice of expected readiness to load.  
Orders for first discharging port to be given latest when vessel [irrespective of whether orders had been given earlier or a port or ports mentioned in the Bills of Lading].

Dropping outward  
Pilot Panama Canal
  10. Vessel to wireless Charterers' Agents at loading and discharging ports, giving 96 hours notice of expected time of arrival; also, 48 hours final notice of arrival to be given to Charterers' Agents at loading and discharging ports.
  11. Owners guarantee minimum 15,580 tons of 2240 lbs. deadweight for cargo and 857,063 cubic feet Grain space in clear holds. Vessel having car pontoons on deck and hoistable car decks in holds.
  12. Vessel has one (1) deck, six (6) hatches and six (6) holds; Charterers' privilege to work all hatches at all times; double winches and double derricks at each hatch in perfect working condition; ship to give free use of steam and winches at all times and supply light for night work, if required, free of expense to Charterers. Vessel's maximum draft at loadport: 31 feet salt water. Vessel has twelve (12) winches and derricks of ten (10) tons each. Vessel has dwt of 20,184 tons on 32'- 10".
- Vessel to furnish a certified calibration scale for all tanks including fore and aft peaks and double bottom tanks and deep tanks; Plimsoll marks amidships and draft marks on port and starboard sides bow and stern to be clearly cut and marked on shell plating; Vessel to furnish capacity plan, displacement scale, and deadweight scale, and same to be certified by the Master as to correctness at time of loading.

if such hatches and any obstacles that might be hindering the loading and discharging of cargo,

3. Vessel to furnish a certified calibration scale for all tanks including fore and aft peaks and double bottom tanks and deep tanks; Plimsoll marks amidships and draft marks on port and starboard sides bow and stern to be clearly cut and marked on shell plating; Vessel to furnish capacity plan, displacement scale, and deadweight scale, and same to be certified by the Master as to correctness at time of loading.
4. Vessel to tender clear of sweat battens and any obstacles that might be hindering the loading and discharging of cargo, including trimming hatch covers and ladders. Tanktops, tunnels, exposed cables and pipes to be entirely and properly protected by the vessel against the hazards normally connected with a scrap cargo. Broken or split boards, cargo battens, dunnage and loose protection on tanktops not to be considered as proper protection. Charterers not to be responsible for damages to sweat battens, hatch covers and trimming hatch covers and any objects if stored in such a way that they are exposed to contact with the cargo. Charterers not to be responsible for damages to ladder brackets and batten clips, removable or unremovable. Warranted wooden bulkhead sheathing and landing pads on tanktops to be in good condition.
5. The stevedores, although appointed by Charterers, Shippers, Receivers or their Agents, to be under the direction and control of the Captain. Charterers, Shippers or Receivers shall not be responsible for the acts and defaults of the stevedores at loading and discharging ports. A joint survey to be held prior to loading and after completion of discharging between Owners and stevedores appointed by Charterers, the expenses of which to be shared equally. All claims for damages allegedly caused by stevedores at loading and discharging ports to be settled directly between Owners and stevedores. Master to notify stevedores of damage, if any, in writing within 24 hours after occurrence. Otherwise, stevedores not to be held liable.
26. Overtime to be for account of party ordering same, however, officers' and crew's overtime always to be for Owners' account.
27. At loading and discharging ports, wharfage on vessel to be for vessel's account and wharfage on cargo to be for Charterers' account.
28. Charterers' privilege to load and discharge with magnets.
29. Charterers' privilege to load and discharge with magnets.
29. Lighterage, if any, either end, to be for Charterers' account.
30. Charterers' Agents both ends, vessel paying the customary Agency fee.
31. After completion of loading and also of discharging, Master to issue and sign a statement as to the status of damages and repairs, if any. The Master has, furthermore, to sign statement of facts concerning the time used in loading and discharging submitted to him by vessel's Agents, also laytime statement each end, making his reservation if he believes these statements to be incorrect. The Master to issue and sign statement that available cargo space on board the M/S FERNGROVE has been utilized and stowed to his satisfaction. The Master to issue and sign draft statement indicating quantity of cargo on board.
32. Classification or ownership to be for vessel's account.



30. Charterers' Agents both ends, vessel paying the customary Agency fee.
31. After completion of loading and also of discharging, Master to issue and sign a statement as to the status of damages and repairs, if any. The Master has, furthermore, to sign statement of facts concerning the time used in loading and discharging submitted to him by vessel's Agents, also laytime statement each end, making his reservation if he believes these statements to be incorrect. The Master to issue and sign statement that available cargo space on board the M/S FERNGROVE has been utilized and stowed to his satisfaction. The Master to issue and sign draft statement indicating quantity of cargo on board.
32. Any extra insurance on account of vessel's age, flag, classification or ownership to be for vessel's account.
33. Any and all differences and disputes of whatsoever nature arising out of this Charter, shall be put to arbitration in the City of NEW YORK pursuant to the Laws relating to arbitration there in force, before a board of three persons consisting of one arbitrator to be appointed by the Owners, one by the Charterers, and one by the two so chosen. The decision of any two of the three on any point or points shall be final.
34. Owners guarantee that vessel is not intended for breakup upon completion of the engagement entered into under this Charter. Should Owners contrary to above guarantee sell the vessel for breakup before she has completed discharge and been released by the Receivers of the cargo, then Owners to pay whatever insurance penalty might be assessed against the Charterers forthwith.
35. Master is not to take on or pump ballast at loading and discharging ports without obtaining permission of the Charterers. Vessel is not to take on, release, or switch from one tank or other compartments to another, any ballast, fresh water or fuel oil while the surveyor is taking draft readings and/or tank soundings.
36. Charterers are not required to accept notice of readiness of the vessel at loading port if the ship has more than eight (8) feet drag by the stern.
37. Owners will instruct Master to authorize in writing vessel's local Agents to sign on his behalf Bills of Lading if surveyor has draft not calculated when vessel is ready to sail.

32. If vessel calls at any U.S. port for purposes of loading or discharging cargo and/or embarking or disembarking passengers vessel's cargo gear and all other equipment must comply with Regulations established by U.S. Public Law 85-742 Part 9 (Safety & Health Regulations for Longshoring). If longshoremen are not permitted to work due to failure of the Master and/or Owners and/or Owners' Agents to comply with the forementioned Regulations, any delay resulting therefrom shall be for Owners' account.
39. Charterers' privilege to sublet this Charter, but original Charterers to remain responsible for its fulfilment. and/or North Vietnam
40. Owners guarantee performing vessel has not called at Cuba since January 1st, 1962.
41. Chamber of Shipping War Risks Clauses 1 and 2, New Jason Clause, New Both-to-Blame Collision Clause, P. & I. Bunkering Clause and U.S.A. Clause Paramount, as attached hereto, are to be considered fully incorporated in this Charter Party.
42. Owners to undertake that vessel is furnished with certificate of evidence of financial responsibility required under the U.S. Water Quality Improvement Act of 1970 and any amendments thereto.
43. Time to count whether in berth or not and whether in port or not.





UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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In the Matter of the Arbitration :

Between :

A/S CUSTODIA, :

Petitioner, :

-and- :

LESSIN INTERNATIONAL, INC., :

Respondent. :

NOTICE OF MOTION TO  
COMPEL ARBITRATION

73 Civ. 4257 (RJW)

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PLEASE TAKE NOTICE, that on the annexed Petition verified on the 5th day of October, 1973, and upon all the papers heretofore filed herein, the undersigned will move in this Court at a stated term for the hearing of motions at the United States Court House, Foley Square, Borough of Manhattan, City and State of New York, on the 23rd day of October, 1973 at 2:15 p.m., or as soon thereafter as counsel can be heard for an Order pursuant to the provisions of the United States Arbitration Act, 9 U.S.C. Section 5, directing the Respondent to appoint an arbitrator in accordance with the arbitration provisions of the contract of Charter Party, the terms of which are, attached hereto within a period of time to be fixed by the Court, and further providing that, in the event respondent should fail to appoint said arbitrator within the time so fixed, the Court will appoint an arbitrator on its behalf, and for such other,

16a

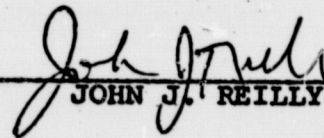
further and different relief as may be just in this  
matter.

Yours, etc.,

HAIGHT, GARDNER, POOR & HAVENS

One State Street Plaza  
New York, N.Y. 10004  
(212) 344-6800

By

  
JOHN J. REILLY

TO:

REGISTERED MAIL RETURN RECEIPT REQUESTED

LESSIN INTERNATIONAL, INC.  
80 W. 40th Street  
New York, New York

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

..... x  
A/S CUSTODIA, :  
Petitioner, :  
and :  
LESSIN INTERNATIONAL, INC., :  
Respondent. :  
..... x

MEMORANDUM OF LAW  
IN SUPPORT OF PETITIONER'S  
MOTION TO COMPEL ARBITRATION

FACTS

On or about June 21, 1973, Petitioner and Respondent entered into a contract of Charter Party whereby the Petitioner agreed to transport at an agreed freight rate and the Respondent agreed to supply an agreed quantity of cargo for transport. The terms of said contract of Charter Party are attached to the Petition herein as Exhibit "A".



There are sums of money due as reimbursement to the Petitioner in accordance with said contract of Charter Party but although payment of said sums has been duly demanded by Petitioner, Respondent has failed to pay said sums in whole or in part. The relevant clause of the contract of Charter Party provides as follows:

"33. Any and all differences and disputes of whatsoever nature arising out of this Charter, shall be put to arbitration in the City of New York pursuant to the Laws relating to arbitration there in force, before a board of three persons consisting of one arbitrator to be appointed by the Owners, one by the Charterers, and one by the two so chosen. The decision of any two of the three on any point or points shall be final."

In view of this arbitration clause and as a consequence of Respondent's failure to pay the aforementioned sums of money for which it is indebted to Petitioner, on September 11, 1973, Petitioner named Mr. William Lynn c/o American Union Transportation, 15 E. 26th Street, New York, New York 10010, to serve as owners' arbitrator



and demanded that Respondent name a second arbitrator and proceed with arbitration. Although Petitioner has repeated this demand, to date the Respondent has failed to comply with the demand.

POINT I

SECTIONS 4, 5 and 6 of THE UNITED STATES ARBITRATION ACT PROVIDE A REMEDY FOR A PARTY ACTING TO COMPEL COMMENCEMENT OF ARBITRATION PROCEEDINGS.

Sections 4, 5 and 6 of the United States Arbitration Act (9 U.S.C.) clearly outline the procedures to be followed by a party aggrieved to compel another party to arbitrate under a written agreement for arbitration. These sections provide as follows:

"Section 4. Failure to arbitrate under agreement; petition to United States Court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination.

A Party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition, any United States district court which, save for such agreement, would have juris-

diction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The Court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, The Court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement\* \* \*.

"Section 5. Appointment of arbitrators or umpire.

If in the agreement provision be made for a method of naming or appointing an arbitrator or an umpire, such method shall be followed; but if no method be provided and any party thereto shall fail to avail himself or such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators, or umpire, or in filling a vacancy, then upon the application of either party to the controversy the Court shall designate or appoint an arbitrator or arbitrators or umpire, as the cause may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise



provided in the agreement the arbitration shall be by a single arbitrator."

"Section 6. Application heard as motion.

Any application to the Court hereunder shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided."

CONCLUSION

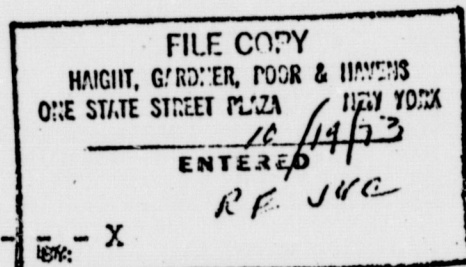
UNDER THE FOREGOING PROVISIONS OF THE UNITED STATES ARBITRATION ACT, IT IS RESPECTFULLY SUBMITTED THAT AN ORDER BE ISSUED DIRECTING RESPONDENT TO PROCEED TO ARBITRATION AND TO APPOINT AN ARBITRATOR WITHIN A PERIOD OF TIME TO BE FIXED BY THE COURT AND PROVIDING THAT IF RESPONDENT FAILS TO APPOINT AN ARBITRATOR WITHIN THE TIME SO FIXED, THE COURT SHALL APPOINT ONE FOR IT.

Respectfully submitted,

HAIGHT, GARDNER, POOR & HAVENS  
Attorneys for Petitioner  
One State Street Plaza  
New York, New York 10004

JOHN J. REILLY  
of Counsel.

*Judge  
Ward  
284-647*



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK  
-----

In the Matter of the Arbitration :

Between :

A/S CUSTODIA, :

73 Civ. 4257 (RJW)

Petitioner, :

and :

AFFIDAVIT IN  
OPPOSITION TO  
PETITION TO COMPEL  
ARBITRATION

LESSIN INTERNATIONAL, INC., :

Respondent. :

----- X

STATE OF NEW YORK )

: ss.:

COUNTY OF NEW YORK)

DR. LEON SINDER, being duly sworn, deposes and  
says:

1. I have personal knowledge of the facts herein  
set forth, and I make this affidavit on behalf of Lessin  
International, Inc. ("Lessin") and in opposition to the  
petition of A/S Custodia to compel arbitration.

2. I am and, at all material times herein, was  
President of Lessin, the respondent herein.

3. Petitioner has moved, pursuant to Sections  
4, 5 and 6 of the United States Arbitrations Act (9 U.S.C.),  
for an order directing Lessin to appoint an arbitrator in  
accordance with the arbitration clause of an alleged con-  
tract of charter party, claimed to have been entered into  
between the parties hereto, dated June 21, 1973.



4. As President I require that my express approval be obtained prior to the execution of any contract by or on behalf of the Corporation.

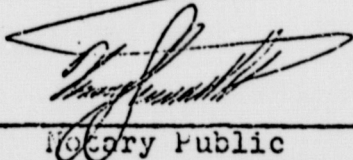
5. Neither I, nor anyone acting on behalf of Lessin has ever entered into a "written agreement for arbitration" with Petitioner to arbitrate any dispute whatsoever. This is confirmed by the fact that the alleged contract of charter party, annexed as Exhibit "A" to the petition, is unsigned.

WHEREFORE, as I understand that a written agreement for arbitration is the sine qua non of an enforceable arbitration under the United States Arbitration Act, I respectfully request that the petitioner's motion be denied and its petition to compel arbitration be dismissed, and that this Honorable Court grant to the respondent costs and such other relief as it may deem just and proper.



---

Sworn to before me this  
14th day of October, 1973



---

Notary Public

HENRY J. SMITH, JR.  
Notary Public in the State of New York  
No. 60-90559-20  
Commission Expires March 30, 1974

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

----- X

In the Matter of the Arbitration :

Between :

73 Civ. 4257

A/S CUSTODIA, :

Judge Ward

Petitioner, :

MEMORANDUM OF LAW IN  
OPPOSITION TO

and :

PETITIONER'S MOTION TO  
COMPEL ARBITRATION.

LESSIN INTERNATIONAL, INC., :

Respondent. :

----- X

FACTS

Petitioner, A/S CUSTODIA, has made application for an order pursuant to Sections 4, 5 & 6 of the United States Arbitration Act (9 U.S.C.), directing Respondent, Lessin International, Inc. ("Lessin"), to proceed to arbitration in accordance with the arbitration clause of an alleged contract of charter party, claimed to have been entered into between the parties hereto, dated June 21, 1973.

On the other hand, the uncontroverted affidavit of Dr. Leon Sinder, President of Lessin, indicates that neither he nor anyone acting on Lessin's behalf has ever entered into a



written agreement for arbitration with Petitioner. Moreover, the alleged contract of charter party, annexed as Exhibit "A" to the petition, is unsigned.

THE MOTION SHOULD BE  
DENIED AND THE PETI-  
TION TO COMPEL ARBI-  
TRATION DISMISSED.

It is well settled that under the United States Arbitration Act ("Act") a written agreement for arbitration is the *sine qua non* of an enforceable arbitration agreement.

Fisser v. International Bank, 282 F.2d 231 (2 Cir. 1960).

While it is true that it is not necessary that a party personally sign an arbitration agreement to be found thereby, it is clear, however, that there must be written contract or agreement to arbitrate signed by someone before arbitration can be compelled under the Act. (Fisser, supra).

The decision of this Court in Garnac Grain Company, Inc. v. Nimpex International, Inc., 249 F. Supp. 986 (S.D.N.Y. 1964), is squarely in point. There, Garnac had petitioned the Court to compel arbitration under Sections 4, 5 & 6 of the Act. The parties, through their brokers, had concluded an oral fixture for a voyage charter of the S.S. BAWFAN. It was understood in concluding the oral fixture that the approved Baltimore Berth

Grain Charter Party with a New York Produce Exchange Arbitration Clause would be used by the parties. The petitioner (charterer) prepared the written charter party according to the oral fixture and transmitted it to owner's agents for signature. Owners refused to sign the charter and never tendered the vessel.

In denying the motion, the Court made it clear that a signed charter party or a written fixture letter incorporating an arbitration clause are necessary to compel arbitration under the Act:

"The parties never entered into a written agreement for arbitration \* \* \* " as required by section 4. A written agreement for arbitration is the sine qua non of an enforceable arbitration agreement. *Fisser v. International Bank*, 282 F.2d 231 (2d Cir. 1960). Although courts have compelled arbitration on the basis of fixture letters, see *Dover S.S. Co. v. Summit Industrial Corp.*, 148 F. Supp. 206 (S.D.N.Y. 1957); cf. *Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978 (2d Cir. 1942), no case has been found, nor has one been cited to us, compelling arbitration on the basis of an oral fixture. The case of *Fisser v. International Bank*, 175 F. Supp. 305 (S.D.N.Y. 1958), cited by the petitioner is inapposite, for in that case there was concededly a written agreement for arbitration, and the only question confronting the court was whether respondent under general principles of contract law was a party to the agreement.



Section 4 requires at least a written fixture making reference to a standard charter containing an arbitration clause, before arbitration can be compelled.

Motion denied. So ordered." (Emphasis added)

As in Garnac, there is no signed charter party or brokers' fixture letter in this case. Accordingly, a similar result should follow.

CONCLUSION

PETITIONER'S MOTION TO COMPEL  
ARBITRATION SHOULD BE DENIED  
AND ITS PETITION DISMISSED, AND  
THIS HONORABLE COURT SHOULD GRANT  
RESPONDENT COSTS AND SUCH OTHER  
RELIEF AS IT MAY DEEM JUST AND  
PROPER.

Dated: New York, New York

October 19, 1973.

Respectfully submitted,

BURLINGHAM UNDERWOOD & LORD  
Attorneys for Respondent

25 Broadway  
New York, New York 10004

Telephone: 422 - 7585

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X

In the Matter of the Arbitration

Between

A/S CUSTODIA,

Petitioner,

REPLY AFFIDAVIT

73 Civ. 4257 (RJW)

-and-

LESSIN INTERNATIONAL, INC.,

Respondent.

-----X

JOHN J. REILLY, being duly sworn, deposes and says:

That he is associated with the firm of Haight, Gardner, Poor & Havens, attorneys for A/S CUSTODIA, the Owners of the M/V FERNGROVE, and that he is familiar with the facts of this matter. This affidavit is in reply to the affidavit of Dr. Leon Sinder and a Memorandum of Law submitted by Lessin International Inc. in opposition to the motion of A/S CUSTODIA to compel arbitration, now returnable on November 7, 1973.

As is more fully explained in the Petitioner's Reply Memorandum of Law, the Arbitration Act, 9 U.S.C. §4 provides that a party aggrieved by the alleged failure to arbitrate under a written agreement for arbitration may petition a United States District Court for the order directing such arbitration to proceed.

In opposition to the Petitioner's motion to compel arbitration, the Respondent, Lessin International, Inc., submitted to the Court the affidavit of Dr. Leon Sinder which states in paragraph 5:



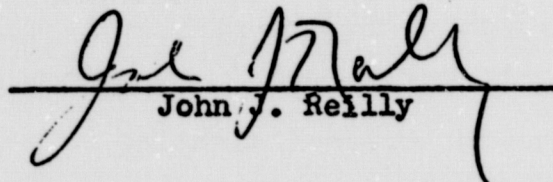
"5. Neither I nor anyone acting on behalf of Lessin is entered in a 'written agreement for arbitration' with Petitioner to arbitrate any dispute whatsoever. This is confirmed by the fact that the alleged contract of charter party, annexed as exhibit 'A' to the Petition, is unsigned."

The Respondent, in its Memorandum of Law in opposition to Petitioner's motion to compel arbitration argues "that there must be written contract or agreement to arbitrate signed by someone before arbitration can be compelled under the Act." It is the Petitioner's contention that under the Arbitration Act, all that is necessary before arbitration can be compelled is that there is a written agreement to arbitrate.

The annexed affidavit of Mr. HAAKON STECKMEST, a Chartering Broker Trainee, employed by J. H. Winchester & Co., indicates that after the terms of the contract were agreed to by the Owners and the Charterers, Messrs. Ocean Freightng & Brokerage Corporation, the Charterers' brokers prepared a written statement of the agreement and forwarded it to J. H. Winchester for signature. This charter party was forwarded to J. H. Winchester & Co. under a cover letter dated June 25, 1973, the original of which is annexed to the affidavit of HAAKON STECKMEST and marked as exhibit "B". This charter party, although unsigned, was prepared by the Charterers' brokers, Messrs. Ocean Freightng & Brokerage Corporation, and its seal is stamped on the charter party (exhibit "A"). A copy of this

written charter party agreement was annexed to the Petition to compel arbitration: As requested by Messrs. Ocean Freightng & Brokerage Corporation in their letter of June 25, 1973, the original of the charter party was signed by J. H. Winchester & Co. on behalf of the Owners and forwarded to Messrs. Ocean Freightng & Brokerage Corporation. It is noteworthy that the printed form of the charter party does not contain any printed provisions for arbitration and that Clause 33, the arbitration clause, is one of Twenty-three (23) additional clauses which were prepared by the Charterers and were considered fully incorporated into the contract. Moreover, the first page of the printed clause contains the caption M/S Ferngrove, C/P dated June 21, 1973.

WHEREAS, the Petitioner has shown that there was a written agreement to arbitrate between the parties, it is requested that the Court enter an Order herein directing that Respondent appoint an arbitrator within a period of time to be fixed by the Court, and further providing that, in the event Respondent should fail to appoint an arbitrator on its behalf, and for such other, further and different relief as may be just in this matter.

  
John J. Reilly

Sworn to before me this

30 day of Oct, 1973.



STATE OF NEW YORK )  
                               : ss.:  
 COUNTY OF NEW YORK)

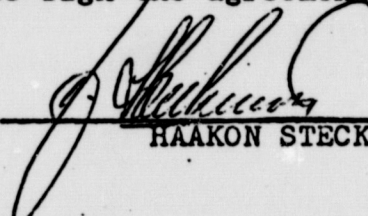
HAAKON STECKMEST, being duly sworn deposes and says:

- 1) I, HAAKON STECKMEST, am presently employed by J.H. Winchester & Co., as a Chartering Broker Trainee.
- 2) I have been employed in this capacity from January 1972 to October 1973. Prior to that time, I was employed for three years as a Ship Broker in Oslo, Norway and Hamburg, Germany.
- 3) I am making this affidavit at the request of the law firm of Haight, Gardner, Poor & Havens, the attorneys for A/S CUSTODIA, the Owners of the M/S FERNGROVE.
- 4) In the beginning of June, a cargo of scrap was quoted to me by Ocean Freightng from Tampa, Florida to Taiwan. As is the usual brokerage practice, I circulated this business to our various cable correspondents. Approximately two weeks after this order was originally quoted. I received on June 20 an offer on this business, from Messrs. Fearnley & Eger's Befraktningsforretning A/S, Oslo, Norway, of the M/S FERNGROVE for account first class charterers. Their offer was given to Ocean Freightng accordingly. The same day Ocean Freightng made a counter offer on the vessel on behalf of Lessin International.
- 5) When the terms of this contract were agreed to by the Owners and the Charterers, Messrs Lessin International Inc. the Charterers' brokers, Messrs. Ocean Freightng & Brokerage Corporation prepared a written statement of the agreement and forwarded it to my office for signature. The written agreement which was forwarded to my office and the covering letter which

accompanied it, are annexed to this affidavit as Exhibits "A" and "B" respectively.

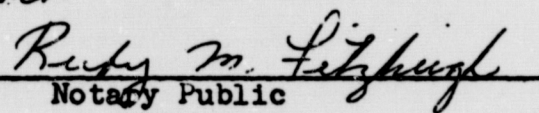
6) In accordance with the request by the Charterers' brokers and after having obtained authority from the Owners, J. H. Winchester & Co. executed the written agreement on behalf of the Owners and returned it to the Charterers' brokers for execution.

7) I was later advised by the Charterers' brokers that the Charterers were not able to obtain the cargo which they intended to ship on the vessel and therefore they refused to sign the agreement.

  
 HAAKON STECKMEST

Sworn to before me this

30th day of October, 1973

  
 Notary Public

RUBY M. FITZHUGH  
 NOTARY PUBLIC, State of New York  
 No. 24-6319985  
 Qualified in Kings County  
 Certificate filed in New York County  
 Commission Expires March 30, 1974



RECOMMENDED

Approved by the Documentary Committee of the  
Chamber of Shipping of the United Kingdom

CODE NAME: GENCON.

Issued to come into force for futures on and after 15th September 1922

The Documentary Council of The Baltic and White Sea Conference

## UNIFORM GENERAL CHARTER

AS REVISED 1922

(only to be used for trades for which no approval form is in force)



NEW YORK, N.Y. June 21, 1973

Owners.

1. It is this Day mutually agreed between A/S CUSTODIA  
(FEARNLEY & EGER, OSLO)

Norwegian

Owners of the ~~steamer~~ motor-vessel

FERNGROVE, Geared Bulker built 1965

of 7744 tons gross Register and carrying about tons of deadweight cargo.

Position.

now trading, Classed 100 A-1 Lloyd's or Equivalent

and expected ready to load under this Charter about July 2, 1973

Charterers.

and Messrs. LESSIN INTERNATIONAL INC.

of New York, N.Y. as Charterers.

Where to load.

That the said vessel shall proceed to One (1) safe berth, Tampa,  
Florida or so near thereto as she may safely get and liealways afloat, and there load a full and complete cargo <sup>Underdeck</sup> ~~(if shipment of deck cargo~~  
~~agreed to be at Charterers' risk) of~~HEAVY HANDY DEADWEIGHT SCRAP (excluding MOTOR BLOCKS  
AND TURNINGS) Stowing maximum 55 cubic feet to the ton  
of 2240 Lbs.(Charterers to provide all mats and/or wood for dunnage and any separations required,  
the Owners allowing the use of any dunnage wood on board if required) which the  
Charterers bind themselves to ship, and being so loaded the vessel shall proceed to

One safe berth, one safe port, Taiwan

~~as ordered on signing Bills of Lading~~ or so near thereto as she may safely get and  
lie always afloat and there deliver the cargo ~~on board~~ <sup>freight</sup> ~~paid~~ <sup>quantity</sup> asfollows LUMP SUM OF \$467,400.00 (FOUR HUNDRED SIXTY-SEVEN  
THOUSAND FOUR HUNDRED DOLLARS) U.S. CURRENCY. If vessel  
loads more than 15,580 Long Tons, Additional Freight to be  
paid at \$30.00 per Ton. Ninety Percent (90%) of Freight  
to be prepaid within seven (7) days after surrender of  
signed Bills of Lading, marked "Freight Prepaid as per

Exhibit "A"

on completion of discharge. Charterers  
privilege to deduct undisputed despatch  
and brokerage from freight. Freight to  
be made payable to J.H. Winchester & Co., 19 Rector St  
N.Y., N.Y. for  
transfer to Owners.

General Clause.

2. Owners are to be responsible for loss of or damage to the goods or for delay in delivery of the goods only in case the loss, damage or delay has been caused by the improper or negligent stowage of the goods (unless stowage performed by shippers or their stevedores or servants) or by personal want of due diligence on the part of the Owners or their Manager to make the vessel in all respects seaworthy and to secure that she is properly manned, equipped and supplied or by the personal act or default of the Owners or their Manager.

And the Owners are responsible for no loss or damage or delay arising from any other cause whatsoever, even from the neglect or default of the Captain or crew or some other person employed by the Owners on board or ashore for whose acts they would, but for this clause, be responsible, or from unseaworthiness of the vessel on loading or commencement of the voyage or at any time whatsoever.

Damage caused by contact with or leakage, smell or evaporation from other goods or by the inflammable or explosive nature or insufficient package of other goods not to be considered as caused by improper or negligent stowage, even if in fact so caused.

Demurrage Clause.

3. The vessel has liberty to call at any port or ports in any order, for any purpose, to sail without pilots, to tow and/or assist vessels in all situations, and also to deviate for the purpose of saving life and/or property.

Payment of Freight.

4. ~~The freight to be paid in cash without discount on delivery of the cargo at mean rate of exchange ruling on day of payment, the receivers of the cargo being bound to pay freight on account during delivery, if required by Captain or Owners.~~

~~Cash for vessel's ordinary disbursements at port of loading to be advanced by Charterers if required at highest current rate of exchange, subject to two per cent. to cover insurance and other expenses.~~

Loading.

5. ~~Cargo to be brought alongside in such a manner as to enable vessel to take the goods with her own tackle and to load the full cargo in running working days. Charterers to procure and pay the necessary men on shore or onboard the lighters to do the work there, vessel only heaving the cargo onboard.~~

~~If the loading takes place by elevator cargo to be put free in vessel's holds, Owners only paying trimming expenses.~~

~~Any pieces and/or packages of cargo over two tons weight, shall be loaded, stowed and discharged by Charterers at their risk and expense.~~

Time to commence at 1 p.m. if notice of readiness to load is given before noon and at 8 a.m. next working day if notice given during office hours after noon.

The notice to be given to the Shippers, Messrs. ....

Time lost in waiting for berth to count as loading time.

Discharging.

6. ~~Cargo to be received by Merchants at their risk and expense alongside the vessel not beyond the reach of her tackle and to be discharged in running working days. Time to commence at 1 p.m. if notice of readiness to discharge is given before noon, and at 3 a.m. next working day if notice given during office hours after noon.~~

~~Time lost in waiting for berth to count as discharging time if incurred, to be paid by Charterers.~~

Demurrage.

7. ~~Ten running days on Demurrage at the rate of Six Thousand Two Hundred per day or pro rata for any part of a day, payable day by day, to be allowed Merchants altogether at ports of loading and discharging.~~

Dollars  
(\$6200.00)

Lien Clause.

8. Owners shall have a lien on the cargo for freight, dead-freight, demurrage and damages for detention. Charterers shall remain responsible for dead-freight and demurrage (including damages for detention), incurred at port of loading. Charterers shall also remain responsible for freight and demurrage (including damages for detention) incurred at port of discharge, but only to such extent as the Owners have been unable to obtain payment thereof by exercising the lien on the cargo.

Bills of Lading.

9. The Captain to sign Bills of Lading at such rate of freight as presented without prejudice to this Charterparty, but should the freight by Bills of Lading amount to less than the total chartered freight the difference to be paid to the Captain in cash on signing Bills of Lading.

Strike, War and War Clause.

10. *Strike Clause, War Clause and War Clause as below.*



has already commenced, at the nearest safe place at the expense of the Cargo Owners. Owners to have the right to fill up with other goods instead of the contraband. 142

Should any port where the vessel has to load under this Charter be blockaded the contract to be null and void with regard to the goods to be shipped at such port. 143

No Bills of Lading to be signed for any blockaded port, and if the port of destination be declared blockaded after Bills of Lading have been signed, Owners shall discharge the cargo either at the port of loading, against payment of the expenses of discharge, if the ship has not sailed thence, or, if sailed at any safe port on the way as ordered by Shippers or if no order is given at the nearest safe place against payment of full freight. 144

## GENERAL ICE CLAUSE. 151

### PORT OF LOADING. 152

- a) In the event of the loading port being inaccessible by reason of ice when vessel is ready to proceed from her last port or at any time during the voyage or on vessel's arrival or in case frost sets in after vessel's arrival, the Captain for fear of being frozen in is at liberty to leave without cargo, and this Charter shall be null and void. 153
- b) If during loading the Captain, for fear of vessel being frozen in, deems it advisable to leave, he has liberty to do so with what cargo he has on board and to proceed to any other port or ports with option of completing cargo for Owner's benefit for any port or ports including port of discharge. Any part cargo thus loaded under this Charter to be forwarded to destination at vessel's expense but against payment of freight, provided that no extra expenses be thereby caused to the Receivers, freight being paid on quantity delivered (in proportion if lumpsum), all other conditions as per Charter. 154
- c) In case of more than one loading port, and if one or more of the ports are closed by ice the Captain or Owners to be at liberty either to load the part cargo at the open port and fill up elsewhere for their own account as under section B or to declare the charter null and void unless Charterers agree to load full cargo at the open port. 155
- d) This Ice Clause not to apply in the Spring. 156

### PORT OF DISCHARGE. 157

- a) Should ice (except in the Spring) prevent vessel from reaching port of discharge Receivers shall have the option of keeping vessel waiting until the re-opening of navigation and paying demurrage, or of ordering the vessel to a safe and immediately accessible port where she can safely discharge without risk of detention by ice. Such orders to be given within 48 hours after Captain or Owners have given notice to Charterers of the impossibility of reaching port of destination. 158
- b) If during discharging the Captain for fear of vessel being frozen in deems it advisable to leave, he has liberty to do so with what cargo he has on board and to proceed to the nearest accessible port where she can safely discharge. 159
- c) On delivery of the cargo at such port, all conditions of the Bill of Lading shall apply and vessel shall receive the same freight as if she had discharged at the original port of destination, except that if the distance of the substituted port exceeds 100 nautical miles, the freight on the cargo delivered at the substituted port to be increased in proportion. 160

Clauses Nos. 16 through 45, both inclusive, as attached hereto, are to be considered fully incorporated in this Charter Party.

LESSIN INTERNATIONAL INC.

LAYDAYS, if required by the Charterers, not to  
be made before June 29, 19

Cancelling Clause.

11. Should the vessel not be ready to load (whether in berth or not) on or before the July 10, 1972 Charterers have the option of cancelling this contract, such option to be declared, if demanded, at least 48 hours before vessel expected arrival at port of loading. Should the vessel be delayed on account of average or otherwise, Charterers to be informed as soon as possible, and if the vessel is delayed for more than 10 days after the day on which it is expected ready to load, Charterers have the option of cancelling this contract, unless a cancelling date has been agreed upon.

General Average.

12. General average to be settled according to York-Antwerp rules, 1950. Freighters of cargo to pay the cargo's share in the general expenses even if same have been necessitated through neglect or default of the Owners' servants (see clause 2).

Indemnity.

13. Indemnity for non-performance of this Charter-party, proved damages, not exceeding estimated amount of Freight.

Agency.

14. In every case the Owner shall appoint his own Broker or Agent both at the port of loading and the port of discharge.

Brokerage.

15. 2½ % brokerage on the freight/earned is due to OCEAN FREIGHTING & BROKERAGE CORP. AND OTHERS

#### DEADFREIGHT AND DEMURRAGE

In case of non execution at least 1/2 of the brokerage on the estimated amount of freight and dead-freight to be paid by the Owners to the Brokers as indemnity for the latter's expenses and work. In case of more voyages the amount of indemnity to be mutually agreed.

#### GENERAL STRIKE CLAUSE.

Neither Charterers nor Owners shall be responsible for the consequences of any strikes or lock-outs preventing or delaying the fulfilment of any obligations under this contract.

If there is a strike or lock-out affecting the loading of the cargo, or any part of it, when vessel is ready to proceed from her last port or at any time during the voyage to the port or ports of loading or after her arrival there, Captain or Owners may ask Charterers to declare, that they agree to reckon the laydays as if there were no strike or lock out. Unless Charterers have given such declaration in writing (by telegram, if necessary) within 24 hours, Owners shall have the option of cancelling this contract. If part cargo has already been loaded, Owners must proceed with same, (freight payable on loaded quantity only) having liberty to complete with other cargo on the way for their own account.

If there is a strike or lock-out affecting the discharge of the cargo on or after vessel's arrival at or off port of discharge and same has not been settled within 48 hours, Receivers shall have the option of keeping vessel waiting until such strike or lock-out is at an end against paying half demurrage after expiration of the time provided for discharging, or of ordering the vessel to a safe port where she can safely discharge without risk of being detained by strike or lock-out. Such orders to be given within 48 hours after Captain or Owners have given notice to Charterers of the strike or lock-out affecting the discharge. On delivery of the cargo at such port, all conditions of this charterparty and of the Bill of Lading shall apply and vessel shall receive the same freight as if she had discharged at the original port of destination, except that if the distance of the substituted port exceeds 100 nautical miles, the freight on the cargo delivered at the substituted port to be increased in proportion.

#### GENERAL WAR CLAUSE.

If the nation under whose flag the vessel sails should be engaged in war and the safe navigation of the vessel should thereby be endangered either party to have the option of cancelling this contract, and if so cancelled, cargo already shipped shall be discharged either at the port of loading or, if the vessel has commenced the voyage, at the nearest safe place at the risk and expense of the Charterers or Cargo-Owners.

If owing to outbreak of hostilities the goods loaded or to be loaded under this contract or part of them become contraband of war whether absolute or conditional or liable to confiscation or detention according to international law or the proclamation of any of the belligerent powers each party to have the option of cancelling this contract as far as such goods are concerned, and contraband goods already loaded to be then discharged either at the port of loading, or if the voyage

informed by Owners or Master  
of such delay.





M/S FERN GROVE  
C/P dated June 21, 1973

16. Cargo is to be loaded, stowed and discharged by the Charterers, free of expense to the vessel.
17. Cargo is to be loaded, stowed and discharged within a total of eighteen (18) weather working days of 24 hours, Sundays and Holidays excepted, unless used.  
If longer detained, Charterers to pay demurrage at the rate stipulated in Clause 7;  
If sooner despatched, Owners to pay despatch at the rate of THREE THOUSAND ONE HUNDRED DOLLARS (\$3100.00) per day or pro rata for part of a day on laytime saved.  
Demurrage and despatch to be settled within sixty (60) days after completion of discharge.
18. Time from Noon Saturday until 8:00 a.m. Monday not to count, unless used  
Time from Midnight preceding Holiday until 8:00 a.m. the day after Holiday not to count, unless used.
19. Owners to give five (5) days notice, also 72/48/24 hours notice of expected readiness to load.  
Orders for first discharging port to be given latest when vessel [irrespective of whether orders had been given earlier or a port or ports mentioned in the Bills of Lading.
20. Vessel to wireless Charterers' Agents at loading and discharging ports, giving 96 hours notice of expected time of arrival; also, 48 hours final notice of arrival to be given to Charterers' Agents at loading and discharging ports.
21. Owners guarantee minimum 15,580 tons of 2240 lbs. deadweight for cargo and 857,063 cubic feet Grain space in clear holds. Vessel having car pontoons on deck and hoistable car decks in holds.
22. Vessel has one (1) deck, six (6) hatches and six (6) holds; Charterers' privilege to work all hatches at all times; double winches and double derricks at each hatch in perfect working condition; ship to give free use of steam and winches at all times and supply light for night work, if required, free of expense to Charterers. Vessel's maximum draft at loadport: 31 feet salt water. Vessel has twelve (12) winches and derricks of ten (10) tons each. Vessel has dwt of 20,184 tons on 32'-10".
23. Vessel to furnish a certified calibration scale for all tanks including fore and aft peaks and double bottom tanks and deep tanks; Plimsoll marks amidships and draft marks on port and starboard sides bow and stern to be clearly cut and marked on shell plating; Vessel to furnish capacity plan, displacement scale, and deadweight scale, and same to be certified by the Master as to correctness at time of loading.

Dropping outward  
Pilot Panama Canal

that might be hindering the loading and discharging of cargo.



24. Vessel to tender clear of sweat battens and any obstacles that might be hindering the loading and discharging of cargo, including trimming hatch covers and ladders. Tanktops, tunnels, exposed cables and pipes to be entirely and properly protected by the vessel against the hazards normally connected with a scrap cargo. Broken or split boards, cargo battens, dunnage and loose protection on tanktops not to be considered as proper protection. Charterers not to be responsible for damages to sweat battens, hatch covers and trimming hatch covers and any objects if stored in such a way that they are exposed to contact with the cargo. Charterers not to be responsible for damages to ladders, brackets and batten clips, removable or unremovable. Warranted wooden bulkhead sheathing and landing pads on tanktops to be in good condition.
25. The stevedores, although appointed by Charterers, Shippers, Receivers or their Agents, to be under the direction and control of the Captain. Charterers, Shippers or Receivers shall not be responsible for the acts and defaults of the stevedores at loading and discharging ports. A joint survey to be held prior to loading and after completion of discharging between Owners and stevedores appointed by Charterers, the expenses of which to be shared equally. All claims for damages allegedly caused by stevedores at loading and discharging ports to be settled directly between Owners and stevedores. Master to notify stevedores of damage, if any, in writing within 24 hours after occurrence. Otherwise, stevedores not to be held liable.
26. Overtime to be for account of party ordering same, however, officers' and crew's overtime always to be for Owners' account.
27. At loading and discharging ports, wharfage on vessel to be for vessel's account and wharfage on cargo to be for Charterers' account.
28. Charterers' privilege to load and discharge with magnets.
28. Charterers' privilege to load and discharge with magnets.
29. Lighterage, if any, either end, to be for Charterers' account.
30. Charterers' Agents both ends, vessel paying the customary Agency fee.
31. After completion of loading and also of discharging, Master to issue and sign a statement as to the status of damages and repairs, if any. The Master has, furthermore, to sign statement of facts concerning the time used in loading and discharging submitted to him by vessel's Agents, also laytime statement each end, making his reservation if he believes these statements to be incorrect. The Master to issue and sign statement that available cargo space on board the M/S FRANKLIN has been utilized and stowed to his satisfaction. The Master to issue and sign draft statement indicating quantity of cargo on board.
32. Any extra insurance on account of vessel's age, flag, classification or ownership to be for vessel's account.
33. Any and all differences and disputes of whatsoever nature arising out of this Charter, shall be put to arbitration in the City of NEW YORK pursuant to the Laws relating to arbitration there in force, before a board of three persons consisting of one arbitrator to be appointed by the Owners, one by the Charterers, and one by the two so chosen. The decision of any

- to be incorrect. The Master to issue and sign statement that available cargo space on board the M/V [redacted] is [redacted] utilized and stowed to his satisfaction. The Master to issue and sign draft statement indicating quantity of cargo on board.
32. Any extra insurance on account of vessel's age, flag, classification or ownership to be for vessel's account.
33. Any and all differences and disputes of whatsoever nature arising out of this Charter, shall be put to arbitration in the City of NEW YORK pursuant to the Laws relating to arbitration there in force, before a board of three persons consisting of one arbitrator to be appointed by the Owners, one by the Charterers, and one by the two so chosen. The decision of any two of the three on any point or points shall be final.
34. Owners guarantee that vessel is not intended for breakup upon completion of the engagement entered into under this Charter. Should Owners contrary to above guarantee sell the vessel for breakup before she has completed discharge and been released by the Receivers of the cargo, then Owners to pay whatever insurance penalty might be assessed against the Charterers forthwith.
35. Master is not to take on or pump ballast at loading and discharging ports without obtaining permission of the Charterers. Vessel is not to take on, release, or switch from one tank or other compartments to another, any ballast, fresh water or fuel oil while the surveyor is taking draft readings and/or tank soundings.
36. Charterers are not required to accept notice of readiness of the vessel at loading port if the ship has more than eight (8) feet drag by the stern.
37. Owners will instruct Master to authorize in writing vessel's local Agents to sign on his behalf Bills of Lading if [redacted] has draft not calculated when vessel is ready to sail.



38. If vessel calls at any U.S. port for purposes of loading or discharging cargo and/or embarking or disembarking passengers, vessel's cargo gear and all other equipment must comply with Regulations established by U.S. Public Law 85-742 Part 6 (Safety & Health Regulations for Longshoring). If longshoremen are not permitted to work due to failure of the Master and/or Owners and/or Owners' Agents to comply with the forementioned Regulations, any delay resulting therefrom shall be for Owners' account.
39. Charterers' privilege to sublet this Charter, but original Charterers to remain responsible for its fulfilment. and/or North Vietnam
40. Owners guarantee performing vessel has not called at Cuba since January 1st, 1962.
41. Charter of Shipping War Risks Clauses 1 and 2, New Jason Clause, New Both-to-Blame Collision Clause, P. & I. Bunkering Clause and "S.A. Clause Paramount, as attached hereto, are to be considered fully incorporated in this Charter Party.
42. Owners to undertake that vessel is furnished with certificate of evidence of financial responsibility required under the U.S. Water Quality Improvement Act of 1970 and any amendments thereto.
43. Time to count whether in berth or not and whether in port or not.



### WAR RISKS CLAUSE

"1. No Bills of Lading to be signed for any blockaded port and if the port of discharge be declared blockaded after Bills of Lading have been signed, or if the port to which the ship has been ordered to discharge either on signing Bills of Lading or thereafter become to which the ship is or shall be prohibited from going by the Government of the Nation under whose flag the ship sails or by any other Government, the carrier shall discharge the cargo at any other port covered by this Charterparty as ordered by the Charterers (provided such other port is not a blockaded or prohibited port as above mentioned) and shall be entitled to freight as if the ship had discharged at the port or ports of discharge to which she was originally ordered.

"2. The ship shall have liberty to comply with any orders or directions as to departure, arrival, routes, ports of call, stoppages, destination, delivery or otherwise lawfully given by the Government of the Nation under whose flag the vessel sails or any department thereof, or any person acting or purporting to act with the authority of such Government or of any department thereof, or by any committee or person acting, under the terms of the War Risks Insurance on the ship, the right to give such orders or directions and if by reason of and in compliance with any such orders or directions anything is done or is not done, the same shall not be deemed a deviation, and delivery in accordance with such orders or directions shall be a fulfilment of the contract voyage and the freight shall be payable accordingly."

C.S.U.K., London--25th September, 1935

Form No. 186—Printed and Sold by Uns & Co., New York U 95194

### BOTH TO BLAME COLLISION CLAUSE.

If the liability for any collision in which the vessel is involved while performing this bill of Lading falls to be determined in accordance with the laws of the United States of America, the following clause shall apply:--

If the ship comes into collision with another ship as a result of the negligence of the other ship and any act, neglect or default of the master, mariner, pilot or the servants of the Carrier in the navigation or in the management of the ship, the owners of the goods carried hereunder will indemnify the Carrier against all loss or liability to the other or carrying ship or her owners in so far as such loss or liability represents loss of or damage to or any claim whatsoever of the owners of said goods, paid or payable by the other or carrying ship or her owners or their insurers, and goods and not on the cargo recovered by the other or non-carrying ship or her owners as part of their claim against the carrying ship or Carrier.

The foregoing provisions shall also apply where the Owners, Operators or those in charge any ship or ships or objects other than, or in addition to, the colliding ships or objects are at fault in respect to collision or contact.

48 Revision--Form 185—Solely by Uns & Co., Inc., 24 Beaver St., N.Y.

**NEW JASON CLAUSE:** In the event of accident, danger, damage or disaster before or after commencement of the voyage resulting from any cause whatsoever, whether due to negligence or not for which, or for the consequences of which, the carrier is not responsible, by statute, contract, or otherwise, the goods, shippers, consignees, or owners of the goods shall contribute with the carrier in general average to the payment of any sacrifices, losses, or expenses of a general average nature that may be made or incurred, and shall pay salvage and special charges incurred in respect of the goods.

If a salving ship is owned or operated by the carrier, salvage shall be paid for as fully as if such salving ship or ships belonged to strangers. Such deposit as the carrier or his agents may deem sufficient to cover the estimated contribution of the goods and any salvage and special charges thereon shall, if required, be made by the goods, shippers, consignees or owners of the goods to the carrier before delivery.

NST--March, 1941

Form No. 163--Printed and Sold by Uns & Co., N. Y. U 17781

### U. S. A. CLAUSE PARAMOUNT

This bill of lading shall have effect subject to the provisions of the Carriage of Goods by Sea Act of the United States, approved April 16, 1936, which shall be deemed to be incorporated herein, and nothing herein contained shall be deemed a surrender by the carrier of any of its rights or immunities or an increase of any of its responsibilities or liabilities under said Act. If any term of this bill of lading be repugnant to said Act to any extent, such term shall be void to that extent, but no further.

Form No. 174

Printed and Sold by UNZ & CO., 24 Beaver St., New York—U 10662

### PROTECTION & INDEMNITY BUNKERING CLAUSE

The vessel in addition to all other liberties shall have liberty as part of the contract voyage and at any stage thereof to proceed to any port or ports whatsoever whether such ports are on or off the direct and/or customary route or routes to the ports of loading or discharge named in this Charter and there take oil bunkers in any quantity in the discretion of owners even to the full capacity of fuel tanks, deep tanks and any other compartment in which oil can be carried whether such amount is or is not required for the chartered voyage.

Form 179 Uns & Co., Inc., 24 Beaver St., N. Y. U 12215

January 2nd, 1918



42a

BY HAND

# *Ocean Freighting & Brokerage Corporation*

*Freight and Steamship Brokers and Agents*

*80 Broad Street*

*New York, N.Y. 10004*

REPLY TO ATTENTION OF

John F. Fitzsimmons

MEMBERS OF



NEW YORK PRODUCE EXCHANGE  
CABLE: "OCFRAT" CODE: NEW BOE  
WHITEHALL 3-4900  
TELEX: 722-2474  
2420412  
02-051  
TWA: 710 561 3422

June 25, 1973

J. H. Winchester & Co.  
19 Rector Street  
New York, N.Y. 10006

ATTENTION: Mr. Hanken Stockmest

Re: M.V. "FETIGROVE"  
C/P dated June 21, 1973  
Our # 10735

Gentlemen:

We are enclosing herewith the original of the above dated Charter Party together with a working copy for your immediate use. We ask that you kindly have the Owners sign the original or alternatively you sign on their behalf and return to us today for signature by the Charterers.

At the same time, please advise the number of copies you will require after signature by the Charterers.

Very truly yours,

OCEAN FREIGHTING & BROKERAGE CORP.

*John F. Fitzsimmons*  
John F. Fitzsimmons,  
Vice President

JFF:mas  
enclosures

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

. . . . . x

In the Matter of the Arbitration :

Between :

A/S CUSTODIA : MEMORANDUM OF  
LAW

Petitioner, :

-and- :

LESSIN INTERNATIONAL INC. :

Respondent. :

. . . . . x

This Memorandum of Law is submitted on behalf of A/S CUSTODIA in reply to the Respondent's Memorandum of Law submitted in opposition to Petitioners motion to compel arbitration.

POINT I

Under the Federal Arbitration Act, 9 U.S.C. §§2, 4 a written agreement is necessary before arbitration can be compelled.

The Arbitration Act, 9 U.S.C. §4 provides in part:

A party aggrieved by the alleged failure, neglect or refusal to another to arbitrate under a written agreement for arbitration may petition any United States District Court which, save for



such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the performance between the parties for an order directing that such arbitration proceed in the manner provided for in such agreement . . . The Court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.

Apparently, it is respondent's contention (see page 2 of Respondents' Memorandum of Law in opposition to Petitioners motion to compel arbitration) that there must be a written contract or agreement to arbitrate and that this agreement must be signed by someone before arbitration can be compelled under Arbitration Act. The Arbitration Act does not contain any requirement that the agreement to arbitrate be "signed" or "subscribed by the party to be charged".

Respondent in its Memorandum of Law submitted in opposition to Petitioner's motion to compel arbitration cites Fisser v. International Bank 282 F.2d 231 (2d. Cir. 1960) for the proposition that a written agreement for arbitration is the sine qua non of an enforceable arbitration agreement. The Second Circuit in Fisser v. International Bank refers to 9 U.S.C. §§ 2, 4 and states:

. . . the act contains no built-in Statute of Frauds Provision<sup>4</sup> but merely requires that the arbitration provision itself be in writing. Ordinary contract principles determine who is bound to such written provision and of course, parties can become contractually bound absent their signatures. It is not surprising then to find a long series of decisions which recognize that the variety of ways in which a party may become bound by a written arbitration provision is limited only by generally operative principles of contract law. \*

The Second Circuit, in footnote 4 contrasts the provisions of 9 U.S.C. §§2, 4 with those of §1449 of the New York Civil Practice Act and states:

4. Compare §1449 of the New York Civil Practice Act which states that "[e]very submission to arbitrate an existing controversy is void, unless it or some note or memorandum thereof be in writing and subscribed by the party to be charged therewith or be his lawful agent" (Emphasis added.) This provision obviously conditions the enforceability of a submission to arbitrate an existing controversy

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\* It is clear that charter parties are maritime contracts Morewood v. Enequist, 64 U.S. 491 (1859) and that oral contracts are generally regarded as valid by maritime law. Kossick v. United Fruit Co., 365 U. S. 731



upon the signature of the party to be charged (citations omitted). \*\*

Domke in his work on Commercial Arbitration states on p. 46:

"The 'in writing' requirement has still another meaning, namely that the arbitration agreement does not have to be signed. This conforms to the widespread practice in many fields of trade and commerce that commercial transactions are concluded by the exchange of letter or telegrams, by the intermediary of brokers who exchange bought and sold notes, and by the conduct of the parties after receipt of contract forms which are not signed and returned. Numerous court decisions show the tendency to accept any manifestation of the intent of the parties to be bound by an arbitration clause without signing it."

The Respondent contends that the written agreement to arbitrate must be signed. In view of the authorities set forth above, it is submitted that the Respondent's contention is without merit.

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\*\* 4. The New York Civil Practice Laws and Rules §7501 now requires only that the arbitration agreement be in writing, eliminating the requirement of former §1449 of a subscription by the party to be charged on an agreement regarding existing controversies.

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X	
In the Matter of the Arbitration	:
- between -	:
A/S CUSTODIA,	:
	:
Petitioner,	:
	:
- and -	:
	:
LESSIN INTERNATIONAL, INC.,	:
	:
Respondent.	:
-----X	

73 Civ. 4257  
(Judge Ward)

REPLY MEMORANDUM OF LAW  
IN OPPOSITION TO PETITIONER'S  
MOTION TO COMPEL ARBITRATION

This Memorandum is submitted on behalf of respondent, Lessin International, Inc., in response to petitioner's Reply Memorandum and Affidavits.

POINT I

THE PARTIES NEVER ENTERED INTO  
A WRITTEN AGREEMENT TO ARBITRATE.

Assuming, arguendo, that the factual allegations contained in the affidavit of Haakon Steckmest (petitioner's broker) are true, they establish nothing more than that the parties entered



into an oral fixture of charter party and that the respondent refused to sign the written charter party subsequently prepared on the basis of the oral fixture. It is clear that there is no written fixture letter in this case and that respondent's brokers, Ocean Freight & Brokerage Corporation, had no authority to - and in fact did not - execute or otherwise enter into a written charter party with petitioner on respondent's behalf.

It is submitted that this is the exact situation presented in Garnac Grain Company, Inc. v. Nimpex International, Inc., 249 F.Supp 986 (S.D.N.Y. 1964), in which the court denied a similar motion brought to compel arbitration.

Rather than undertake the (albeit impossible) task of distinguishing Garnac, petitioner attempts to divert the court's attention from Garnac by challenging the underscored portion of respondent's contention that "there must be a written contract or agreement to arbitrate signed by someone . . ." in order to compel arbitration. While respondent concedes that a party's signature is not always necessary for it to become a party to a binding contract, this exception is irrelevant. Petitioner has produced no evidence - as the law requires - that respondent or someone acting on its behalf "entered into a written agreement for arbitration":

"The parties never entered into 'a written agreement for arbitration . . . ' as required by section 4. A written agreement for arbitration is the sine qua non of an enforceable arbitration agreement. Fisser v. International Bank, 282 F.2d 231 (2d Cir. 1960). Although courts have compelled

"arbitration on the basis of fixture letters, see *Dover S.S. Co. v. Summit Industrial Corp.*, 148 F.Supp.206 (S.D.N.Y. 1957); cf. *Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978 (2d Cir. 1942), no case has been found, nor has one been cited to us, compelling arbitration on the basis of an oral fixture. The case of *Fisser v. International Bank*, 175 F.Supp.305 (S.D.N.Y. 1958), cited by the petitioner is inapposite, for in that case there was concededly a written agreement for arbitration, and the only question confronting the court was whether respondent under general principles of contract law was a party to the agreement.

"Section 4 requires at least a written fixture making reference to a standard charter containing an arbitration clause, before arbitration can be compelled."

*Garnac, supra*, 249 F.Supp. at 986  
[Emphasis added]

Parenthetically, this conclusion is also supported by the remainder of Footnote 4 [*Fisser v. International Bank*, 282 F.2d 231 (2 Cir. 1960)], quoted by petitioner in its Reply Memorandum (pp. 3 and 4), which petitioner understandably chose to omit:

"These same authorities hold, however, that under another portion of § 1449, which like the Federal Arbitrations Act provides that '[a] contract to arbitrate a controversy thereafter arising between the parties must be in writing,' . . . "

282 F.2d at 233 [Emphasis added].

In conclusion, neither respondent nor anyone acting on its behalf entered into a written contract with petitioner containing an agreement to arbitrate. Under the circumstances in this case, the absence of a written fixture letter or executed charter party is fatal to petitioner's motion.



POINT IITHE EXISTENCE OF AN ORAL FIXTURE  
OR CHARTER IS IRRELEVANT

As in Garnac, the existence of a binding oral fixture or charter party has no bearing in determining whether grounds exist for compelling arbitration between the parties herein. Petitioner has cited no authority compelling arbitration on the basis of an oral fixture or charter party for the simple reason that none exists.

In passing, it should be noted that the denial of petitioner's motion to compel arbitration will in no way prevent petitioner from attempting to recover its alleged damages in an action at law.

CONCLUSION

PETITIONER'S MOTION TO COMPEL ARBITRATION SHOULD BE DENIED AND ITS PETITION DISMISSED, AND THIS HONORABLE COURT SHOULD GRANT RESPONDENT COSTS AND SUCH OTHER RELIEF AS IT MAY DEEM JUST AND PROPER.

Dated: New York, N.Y.

November 7, 1973

Respectfully submitted,

BURLINGHAM UNDERWOOD & LORD  
Attorneys for Respondent

25 Broadway  
New York, N.Y. 10004

Telephone: (212) 422-7585

FREDERICK M. SEVEKOW, JR.  
Of Counsel

In the Matter of the Arbitration

Between

A/S CUSTODIA and LESSIN INTERNATIONAL, INC.  
73 Civ. 4257

Inasmuch as the parties do not appear to have entered into "a written agreement for arbitration \* \* \* " as required by the United States Arbitration Act, 9 U.S.C. §4, the motion to compel arbitration is denied and the petition is dismissed with costs. Garnac Grain Company v. Nimpex International, Inc., 249 F. Supp. 987 (S.D.N.Y. 1964).

It is so ordered.

Dated: November 15, 1973

/s/ Robert J. Ward  
U. S. D. J.



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X

In the Matter of the Arbitration :

Between :

A/S CUSTODIA, :

Petitioner, :

-and- :

LESSIN INTERNATIONAL, INC. :

Respondent. :

NOTICE OF MOTION FOR  
REARGUMENT

73 Civ. 4257 (RJW)

-----X

PLEASE TAKE NOTICE, that on the annexed affidavit verified on the 21st day of November, 1973 and upon all papers heretofore filed herein the undersigned will move under Rules 9M of the General Rules for the Southern and Eastern District of New York, in this Court at the United States Courthouse, Foley Square, Borough of Manhattan, City and State of New York on the 4th day of December, 1973 at 2:15 p.m. or as soon thereafter as counsel can be heard for reargument of the motion to compel arbitration, previously filed herein, which motion was denied by the Order of this Honorable Court dated November 15, 1973, and for such other and further relief as this Court may deem just and proper.

hours, etc.  
HAIGHT, GARDNER, POOR & HAVENS

By /s/ John J. Reilly  
Attorneys for Petitioner  
One State Street Plaza  
New York, New York 10004  
(212) 344-6800

TO: BURLINGHAM, UNDERWOOD & LORD  
25 Broadway  
New York, New York 10004

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

. . . . . x  
In the Matter of the Arbitration :  
Between :  
A/S CUSTODIA, :  
Petitioner, : 73 Civ. 4257 (RJ)  
and :  
LESSIN INTERNATIONAL, INC., :  
Respondent. :  
. . . . . x

MEMORANDUM OF LAW IN  
SUPPORT OF PETITIONER'S MOTION FOR REARGUMENT

In Interocean Shipping Co. v. National  
Shipping and Trading Corp., 462 F.2d 673 (1972) the  
United States Court of Appeals for the Second Circuit  
held that in a proceeding to compel arbitration,  
fact issues determinative of whether any of the alle:  
charterers had entered into the charter party  
containing arbitration agreement were not to be  
determined on affidavits but by full trial. In the



Interocean case, the petitioner, in order to substantiate its claim that a charter agreement existed, attached to the Petition to Compel Arbitration a copy of an unexecuted "Mobiltime" form prepared by the broker and sent to the parties. However the petitioner conceded that no agreement was reached on one of the clauses. Thus the Court held that it was necessary to have a full trial on the question of whether or not a full agreement had been made.

In the case at bar there is no allegation that the parties failed to reach agreement on any particular clause. The Respondent's defense is based solely on the fact that the charter party is not signed.

Petitioner respectfully submits that it has demonstrated that it is entitled to proceed to arbitration. Moreover, the Petitioner contends that the Respondent has not raised any issue which would preclude arbitration. However, if this Honorable Court finds that the affidavits submitted by Respondent do raise an issue which would preclude arbitration, then the issue should be determined not on the basis of affidavits but by a full trial.

CONCLUSION

Since the Petitioner and the Respondent entered into a contract of charter party which contained a written arbitration agreement, the Petitioner's motion to compel arbitration should be granted.

Respectfully submitted,

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Attorneys for Petitioner  
One State Street Plaza  
New York, New York 10004  
344-6800

JOHN J. REILLY  
Of Counsel..



UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- - - - - X

In the Matter of the Arbitration :

- between - :

A/S CUSTODIA, :

73 Civ. 4257

Petitioner, : (Judge Ward)

- and - :

LESSIN INTERNATIONAL, INC., :

Respondent. :

- - - - - X

MEMORANDUM OF LAW IN OPPOSITION  
TO PETITIONER'S MOTION FOR REARGUMENT

By its order dated November 15, 1973, this Honorable Court, citing Garnac Grain Company v. Nimpex International Inc., 249 F. Supp. 986 (S.D.N.Y. 1964), denied petitioner's motion to compel arbitration because the parties did not appear to have entered into 'a written agreement for arbitration \* \* \*'."

Petitioner seeks reargument pursuant to General Rule 1(m) which requires, in part, "a memorandum setting forth concisely the matters or controlling decisions which counsel believes the court has overlooked."

Surprisingly, petitioner's memorandum cites only one case, Interocean Shipping Co. v. National Shipping and Trading Corp., 462 F. 2d 673 (2 Cir. 1972), a case which petitioner itself overlooked.

It is respectfully submitted that petitioner would have been well advised to continue "overlooking" Interocean. The case is entirely consistent with Garnac's requirement for "at least a written fixture making reference to a standard charter containing an arbitration clause, before arbitration can be compelled." 249 F. Supp. at 986. This follows from the simple fact - a fact which petitioner neglected to bring to the Court's attention - that Interocean was a case involving a written fixture letter:

"Interocean relied primarily on a fixture note dated March 17, 1971 to show that National and Hellenic had agreed to charter Interocean's vessel. This fixture note was prepared by Poten & Partners, Inc., charter brokers, and was sent to the parties on March 17. It indicated that Hellenic, a subsidiary of National, had agreed to charter the Oswego Reliance for approximately one year in accordance with the terms of a "Mobiltime" form charter, excluding clauses 9, 12(a)(ii), 12(b)(ii) and 12(b)(iii), and subject to a suitable drydock clause to be worked out for November dry-docking. The charter was to begin with the delivery of the vessel to Hellenic in the Persian Gulf between March 31 and April 15, 1971."

462 F. 2d at 675  
(Emphasis added.)



Clearly, if the Court in Interocean found that charterers were bound by the terms of the broker's fixture letter, arbitration could be compelled on the basis of that written instrument. Conversely, as there is no underlying fixture letter or written agreement entered into between the parties in this case, the decision in Garnac remains controlling.

Conclusion

Petitioner - rather than this Honorable Court - "overlooked" the decision in Interocean, which case in no way supports the pending motion because of the presence of the broker's written fixture letter therein. Accordingly, petitioner's motion for reargument should be denied.

It is further submitted that the pending motion is petitioner's "third bite at the apple" (third set of motion papers) and that respondent Lessin International, Inc. has incurred considerable expense because of petitioner's "appetite". Accordingly, it is respectfully requested that this Court award respondent costs in the sum of \$150., i.e., \$50 per.

\* \* \*

PETITIONER'S MOTION FOR REARGUMENT SHOULD BE DENIED  
AND ITS PETITION DISMISSED, AND THIS HONORABLE COURT SHOULD  
GRANT RESPONDENT COSTS IN THE SUM OF \$150, TOGETHER WITH SUCH

OTHER RELIEF AS IT MAY DEEM JUST AND PROPER.

Dated: New York, New York

November 28, 1973.

Respectfully submitted,

BURLINGHAM UNDERWOOD & LORD  
Attorneys for Respondent

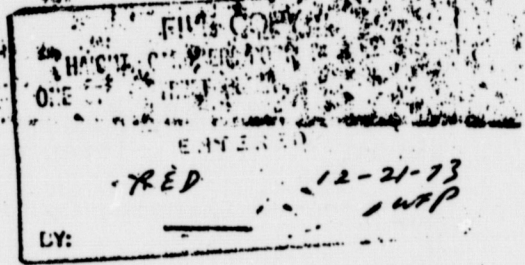
25 Broadway  
New York, New York 10004

Telephone: (212) 422 - 7585

FREDERICK M. SEVEKOW, JR.

Of Counsel





UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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In the Matter of the Arbitration

Between :

A/S CUSTODIA, :

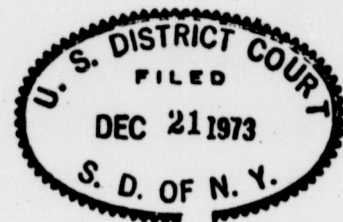
Petitioner, :

and :

LESSIN INTERNATIONAL, INC., :

Respondent. •

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73 Civ. 4257  
R.J.W.

Petitioner, A/S Custodia, moves under Rule 9(m) of the General Rules for the Southern and Eastern Districts of New York for reargument of its motion to compel arbitration which was previously denied by an order of this Court dated November 15, 1973. For the reasons hereinafter stated, the motion for reargument is denied.

The Court, citing Garnac Grain Company v. Nimpex International, Inc., 249 F. Supp. 986 (S.D.N.Y. 1964), denied petitioner's motion to compel arbitration because the parties did "not appear to have entered into 'a written agreement for arbitration \* \* \*' as required by the United States Arbitration Act, 9 U.S.C. §4." Petitioner now asks for the alternative relief of a trial on the issue of whether the parties had

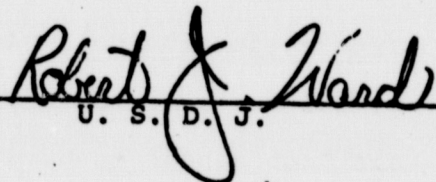
entered into a written agreement for arbitration relying on Interocean Shipping Co. v. National Shipping and Trading Corp., 462 F.2d 673 (2d Cir. 1972), a case which it brings to the Court's attention for the first time upon the instant motion for reargument.

In order to determine whether there is a triable issue, it is necessary to examine the record. Upon the record presented to the Court, petitioner has not demonstrated that it is entitled to a trial on the issue of whether the parties had entered into "a written agreement for arbitration" as required by 9 U.S.C. §4. All that existed was an oral agreement reached through the respective brokers for the parties and a proposed written Charter Party agreement which was never executed by respondent. This is made abundantly clear by the affidavit of Haakon Steckmest submitted on behalf of petitioner and by Exhibit "B" attached thereto. Unlike Interocean Shipping Co. v. National Shipping and Trading Corp., supra, no written fixture was entered into in the instant case.

Under the circumstances set forth, the petitioner is not entitled to a trial. The motion is, therefore, denied without costs.

It is so ordered.

Dated: December 21, 1973

  
U. S. D. J.



UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X  
A/S CUSTODIA, :  
Petitioner, : 73 Civ. 4257 RJW  
-against- : JUDGMENT  
LESSIN INTERNATIONAL, INC., :  
Respondent. :  
-----X

An order having been entered herein on November 25, 1973 denying petitioner's motion to compel arbitration and dismissing the petition with costs, and petitioner's motion for reargument having been denied by order of this Court by The Honorable Robert J. Ward on December 21, 1973, it is

ORDERED, ADJUDGED AND DECREED that the petition be, and here is, dismissed with costs to the respondent.

Dated: New York, New York  
January 3rd, 1974

/s/ Raymond F. Burghardt  
CLERK OF THE COURT

RECEIVED  
DURHAM  
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